

KERRY LYNN REITZ,
Plaintiff,
v.
CAROLYN W. COLVIN, Commissioner
of Social Security,¹
Defendant.

No. CV-11-0302-CI
ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AND REMANDING

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 16, 27. Attorney Thomas Bothwell represents Kerry Lynn Reitz (Plaintiff); Special Assistant United States Attorney Debra J. Meachum represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for

¹ Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d), Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

1 additional proceedings pursuant to 42 U.S.C. § 405(g).

2 **JURISDICTION**

3 Plaintiff protectively filed for Supplemental Security Income
4 (SSI) on January 7, 2008. Tr. 138. She alleged disability due to
5 bilateral sacrolilitis, back pain, depression, post traumatic stress
6 disorder (PTSD), anxiety, and hip and knee injury. Tr. 151. At the
7 hearing, her alleged onset date was amended to January 1, 2008. Tr.
8 30. Benefits were denied initially and on reconsideration.
9 Plaintiff timely requested a hearing before an administrative law
10 judge (ALJ), which was held before ALJ Benita A. Lobo on March 2,
11 2010. Plaintiff, who was represented by counsel, and vocational
12 expert Crystal Yama (VE) testified. Tr. 27-51. On May 7, 2010,
13 the ALJ denied benefits. Tr. 12-21. The Appeals Council denied
14 review 5-8), and the matter now is before this court pursuant to 42
15 U.S.C. § 405(g).

16 **STANDARD OF REVIEW**

17 It is the role of the trier of fact, not this court, to resolve
18 conflicts in evidence. *Richardson v. Perales*, 402 U.S. 389, 400
19 (1971). If evidence supports more than one rational interpretation,
20 the court may not substitute its judgment for that of the
21 Commissioner. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (1999); *Allen*
22 *v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a
23 decision supported by substantial evidence will still be set aside
24 if the proper legal standards were not applied in weighing the
25 evidence and making the decision. *Browner v. Secretary of Health*
26 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is
27 substantial evidence to support the administrative findings, or if
28 there is conflicting evidence that will support a finding of either

1 disability or non-disability, the finding of the Commissioner is
2 conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir.
3 1987).

4 SEQUENTIAL EVALUATION

5 The Commissioner has established a five-step sequential
6 evaluation process for determining whether a person is disabled. 20
7 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
8 137, 140-42 (1987). In steps one through four, the burden of proof
9 rests upon the claimant to establish a prima facie case of
10 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
11 920, 921 (9th Cir. 1971). This burden is met once a claimant
12 establishes that a physical or mental impairment prevents him from
13 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
14 416.920(a). If a claimant cannot do his past relevant work, the ALJ
15 proceeds to step five, and the burden shifts to the Commissioner to
16 show that (1) the claimant can make an adjustment to other work; and
17 (2) specific jobs exist in the national economy which claimant can
18 perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v.*
19 *Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

20 STATEMENT OF THE CASE

21 The facts of the case are set forth in detail in the transcript
22 of proceedings and are briefly summarized here. At the time of the
23 hearing, Plaintiff was 46 years old, unmarried and living with a
24 friend. Tr. 31. She testified she graduated from high school and
25 had past work experience as a school custodian and a cook for a
26 senior center. Tr. 32. Plaintiff reported she could no longer work
27 due to hip, back, neck and leg pain after she injured herself on the
28 job in about 1998. Tr. 31-32. She testified she also had emotional

1 problems that prevented her from returning to the work place. She
2 stated she could not be around people, could not concentrate, and
3 she gets confused and flustered in a work environment. Tr. 32-33.

4 **ADMINISTRATIVE DECISION**

5 At step one, ALJ Lobo found Plaintiff had not engaged in
6 substantial gainful activity since applying for SSI. Tr. 14. At
7 step two she found Plaintiff had severe impairments "Low Back Pain,
8 Left Knee Problems; Bilateral Carpal tunnel Syndrom (CTS);
9 hypertension; and Depression." *Id.* She found Plaintiff's
10 hypertension did not cause severe deficits in function and the
11 diagnosed gastroesophageal reflux disease was non-severe. *Id.* At
12 step three, the ALJ found Plaintiff's impairments, alone and in
13 combination, did not meet or medically equal one of the listed
14 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
15 (Listings). Tr. 14-15.

16 At step four, the ALJ discussed the medical evidence and found
17 Plaintiff's self-reported symptoms and limitations were not
18 credible. Tr. 19. She assessed Plaintiff as having the residual
19 functional capacity (RFC) to:

20 [L]ift and carry less than 10 pounds frequently, 10 pounds
21 occasionally; to stand and walk for two hours and to sit
22 for six hours out of an eight hour day; to push and pull
23 within the limits of lifting and carrying; to engage in
24 occasional postural movements, with the exception of never
25 climbing ropes, ladders or scaffolds; to manipulate
frequently but grasping would be limited; to see and
communicate without restriction and to work within any
environment; to understand, recall and carry out simple
instructions; and to make simple work related judgments.

26 Tr. 15-16.

27 Based on the RFC and VE testimony, the ALJ concluded Plaintiff
28 could not perform her past work. Tr. 20. Proceeding to step five,

1 the ALJ considered VE testimony and found there was a significant
2 number of jobs in the national economy Plaintiff could perform, such
3 as receptionist, office clerk, and accounting clerk. She concluded
4 Plaintiff was not disabled as defined by the Social Security Act
5 during the relevant period. Tr. 20-21.

6 **ISSUES**

7 The question is whether the ALJ's decision is supported by
8 substantial evidence and free of legal error. Plaintiff argues the
9 ALJ erred when she: (1) improperly rejected the opinions of treating
10 and examining medical providers; (2) did not find PTSD was a severe
11 impairment at step two; (3) failed to fully develop the record; and
12 (4) failed to meet the Commissioner's burden at step five. ECF No.
13 17 at 8. Defendant responds the Commissioner's decision is
14 supported by substantial evidence and free of legal error. ECF No.
15 22.

16 **DISCUSSION**

17 **A. Treating and Examining Medical Source Opinions**

18 Plaintiff contends the ALJ did not give legally sufficient
19 reasons supported by the record for rejecting medical opinions from
20 the following treating physicians: Paul Garrison, M.Ed.; Ricardo
21 Gamez, M.Ed.;² James Goodwin, Psy.D.; Alison Mitchell, M.D.; Mahlon
22

23 ² Both Mr. Garrison and Mr. Gamez are identified as treating
24 physicians in Plaintiff's briefing. ECF No. 17 at 4, 11, 12.
25 However, the record shows neither is a licensed psychologist or
26 physician, and therefore is not an acceptable medical source for
27 purposes of diagnosing a medically determinable impairment. 20
28 C.F.R. § 416.913; *see infra* at section B. Rather, these providers

1 Dalley, Ph.D., and Andre Nye, M.D. ECF No. 17 at 11.

2 Under the Regulations, a treating physician's opinion generally
3 is given more weight than an examining physician's opinion, and an
4 examining physician's opinion is given more weight than a non-
5 examining physician's opinion. 20 C.F.R. § 416.927; *Benecke v.*
6 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004); *Lester v. Chater*, 81
7 F.3d 821, 830 (9th Cir. 1995). If an ALJ rejects an uncontradicted
8 acceptable medical source opinion, she must provide "clear and
9 convincing" reasons for doing so. *Lester*, 81 F.3d at 830. If the
10 medical opinion is contradicted, it can only be rejected for
11 "specific" and "legitimate" reasons that are supported by
12 substantial evidence in the record. *Andrews v. Shalala*, 53 F.3d
13 1035, 1043 (1995).

14 The Commissioner can meet this burden by providing "a detailed
15 and thorough summary of the facts and conflicting clinical evidence,
16 stating his interpretation thereof, and making findings."
17 *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (*quoting*
18 *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986)). Courts have
19 recognized conflicting medical evidence, the absence of regular
20 medical treatment during the alleged period of disability, and the
21 lack of medical support for doctors' reports based substantially on
22 a claimant's subjective complaints as specific, legitimate reasons
23 for disregarding a treating physician's opinion. *Flaten v. Secretary*
24 *of Health and Human Servs.*, 44 F.3d 1453, 1463-64 (9th Cir. 1995);

25 _____
26 appear to be mental health clinicians who assessed Plaintiff in 2001
27 when she sought treatment after experiencing significant emotional
28 trauma. Tr. 667-74.

1 *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989). Rejection of a
2 medical source opinion is specific and legitimate where the medical
3 source's opinion is not supported by his or her own medical records
4 and/or objective data. *Tommasetti v. Astrue*, 533 F.3d 1035, (9th
5 Cir. 2008).

6 Inconsistencies between a physician's own notes and her
7 conclusions is also a specific and legitimate reason to reject a
8 contradicted treating physician's opinion. Where an examining
9 physician's contradicting opinion is based on independent findings,
10 it may be sufficient to reject a treating physician's opinion. *Orn*
11 *v. Astrue*, 495 F.3d 625, 631-32 (9th Cir. 2007). However, at all
12 times, the ALJ's reasoning must be supported by substantial evidence
13 in the record. *Lester*, 81 F.3d at 830-31.

14 **1. Providers Garrison and Gamez**

15 The record shows these mental health professionals assessed
16 Plaintiff with PTSD in November 2002, well before Plaintiff's
17 claimed onset date and period of disability. Tr. 671-74.
18 However, neither provider is qualified to establish a medically
19 determinable impairment under the Commissioner's regulations
20 (Regulations). 20 C.F.R. § 416.913(a). Regarding functional
21 limitations assessed by these sources, their opinions are of limited
22 relevance because (1) the opinions predate Plaintiff's alleged onset
23 date by over five years, and (2) their observations and conclusions
24 are based on a one time face-to-face interview with Plaintiff. Tr.
25 666. See *Carmickle v. Commissioner of Soc. Sec.*, 533 F.3d 1155,
26 1165 (9th Cir. 2008); SSR 06-03p at *4-5 (frequency of contact with
27 claimant a factor to consider in weighing other medical source
28 opinions). Therefore, the ALJ was not obliged to discuss or explain

1 the weight given to this non-probative evidence. *Vincent v.*
2 *Heckler*, 739 F.2d 1393, 1394-95 (1984).

3 **2. Dr. Mitchell**

4 Plaintiff also contends the ALJ erroneously rejected the
5 opinions of Dr. Mitchell, a medical doctor, who evaluated Plaintiff
6 in March 2004. Tr. 266-67. As noted by Plaintiff, Dr. Mitchell
7 diagnosed moderate major depression with chronic leg pain. Tr. 265-
8 66. She opined Plaintiff was restricted in her mobility and
9 flexibility "due to pain," noting that pain exacerbated Plaintiff's
10 depression. Tr. 265. Medication and counseling were recommended.
11 Tr. 266-67. The ALJ's step two findings of depression and pain as
12 severe impairments do not conflict with this medical evidence and
13 are supported by other medical evidence that relates to the period
14 of claimed disability. Tr. 14. Therefore, the ALJ was not required
15 to reject these opinions. Regarding limitations, however, Dr.
16 Mitchell's one time evaluation predates the claimed period of
17 disability by almost three years and is not sufficiently relevant
18 for consideration in assessing Plaintiff's RFC in these proceedings.
19 The ALJ was not required to explain weight given or reasons for
20 disregarding Dr. Mitchell's opinions regarding functional
21 limitations. *Vincent*, 739 F.2d at 1395.

22 **3. Dr. Goodwin**

23 In 2006, Dr. Goodwin diagnosed major depression disorder and
24 pain disorder, with a "rule out" diagnosis of PTSD. Tr. 225.
25 Although Plaintiff was evaluated multiple times thereafter by
26 licensed psychologists, as discussed below, there is no substantial
27 evidence from an acceptable medical source to establish a clear
28 diagnosis of PTSD that lasted until Plaintiff's application for

1 disability benefits. The fact that non-acceptable medical sources
2 in the record assessed PTSD is not sufficient to establish a
3 medically determinable mental impairment. 20 C.F.R. § 416.913.
4 Because no relevant or probative evidence supports Dr. Goodwin's
5 "rule out" PTSD diagnosis, the ALJ was not obliged to credit or give
6 reasons for rejecting the rule out diagnosis. The ALJ did not err
7 in excluding PTSD as a medically determinable impairment at step
8 two.

9 Regarding marked and severe functional limitations assessed by
10 Dr. Goodwin in May 2006, the record shows he did not expect her
11 condition to last more than six months; therefore, those opinions
12 are not relevant to Plaintiff's claimed period of disability and the
13 ALJ was not required to discuss or give weight to Dr. Goodwin's
14 outdated assessment of limitations. Tr. 227-26.

15 **4. Dr. Dalley**

16 The record shows Dr. Dalley and his associates at Behavioral
17 Assessments and Counseling evaluated Plaintiff in September 2003 and
18 September 2006. Tr. 283-88, 278-82. In 2003, based on interview,
19 objective testing, and observation, Dr. Dalley diagnosed major
20 depressive disorder (recurrent and moderate) and borderline
21 personality disorder. Tr. 287. Because Dr. Dalley's observations
22 and test results in 2003 reflect Plaintiff's condition many years
23 before Plaintiff's application for benefits in 2008, findings in
24 this report have limited relevance in these proceedings, and the ALJ
25 was not required to discuss them. *Vincent*, 739 F.2d at 1395.

26 In September 2006, Dr. Dalley and associates evaluated
27 Plaintiff again, also based on interview, objective testing and
28 observation. Tr. 308-20. They maintained the diagnosis of major

1 depressive disorder (recurrent and moderate), and found a pain
2 disorder associated with psychological factors and her medical
3 condition. Dr. Dalley did not endorse a diagnosis of borderline
4 personality disorder or PTSD. Tr. 281. The ALJ did not err in
5 accepting only Dr. Dalley's 2006 diagnoses of major depression and
6 pain, conditions that were referenced by medical sources and mental
7 health therapists who treated Plaintiff during the claimed period of
8 disability. See, e.g., Tr. 302-03, 324-25, 441-45, 466. The ALJ's
9 step two findings of depression and back and leg pain are supported
10 by Dr. Dalley's diagnoses and other substantial evidence in the
11 record. See e.g., Tr. 351, 362.

12 Regarding the functional limitations assessed by Dr. Dalley in
13 2006, Plaintiff argues these limitations should have been discussed
14 and given weight because there is no evidence that her condition
15 improved after Dr. Dalley's evaluation. ECF No. 17 at 12. This
16 argument is without merit. In steps one through four of the
17 sequential evaluation process, the burden is on Plaintiff to show
18 she is disabled. To obtain SSI benefits, Plaintiff must prove that
19 she was disabled for "twelve continuous months," after her alleged
20 onset date. 20 C.F.R. § 416.909, .920(c). As is the case with a
21 diagnosis, evidence of limitations on a claimant's ability to work
22 that predates Plaintiff's alleged period of disability "[is] of
23 limited relevance." *Carmickle*, 533 F.3d at 1165. Dr. Dalley's
24 2006 functional limitations, standing alone, are insufficient to
25 meet Plaintiff's burden; thus, it was neither unreasonable nor legal
26 error for the ALJ to disregard functional limitations that were
27 assessed well before January 2008. *Id.* (citing *Allen v. Heckler*,
28 749 F.2d, 577, 579 (9th Cir. 1985) (ALJ's rational interpretation of

1 evidence will not be disturbed by reviewing court). The ALJ did not
2 err in disregarding functional limitations assessed by Dr. Dalley
3 and associates in 2006.

4 **5. Dr. Nye**

5 The record includes evaluations and treatment notes from Dr.
6 Nye at the Moses Lake Clinic between 2004 and 2008. Tr. 206-09,
7 259, 361-80, 438-39. While medical evidence prior to 2007, (one
8 year before Plaintiff's alleged disability onset date) is of limited
9 relevance, it is noted that in 2004 after Plaintiff injured her
10 back, Dr. Nye opined Plaintiff could not work at her job as a
11 janitor until she had an opportunity to see a neurologist and/or her
12 back condition was resolved. Tr. 259.

13 In 2005, the neurologist to whom Plaintiff was referred
14 reported that imaging reports revealed "mild disc changes and
15 foraminal involvement." Tr. 223. He indicated MRI results provided
16 no objective evidence of nerve root involvement or "clear cut
17 abnormalities." Tr. 222. Thus, the record shows objective
18 evidence did not establish conclusively a severe medically
19 determinable impairment at that time, and the ALJ was not required
20 to discuss or give weight to Dr. Nye's early, non-probative
21 findings.

22 As found by the ALJ, the record includes notes from March 2007
23 when Plaintiff was examined by Wing C. Chau, M.D., who opined she
24 was capable of medium work. Tr. 17, 330. De novo review reveals
25 that in May 2007, Dr. Chau re-examined Plaintiff and noted no
26 evidence of lumbar radiculopathy. Tr. 345. During followup visits
27 in 2007, Dr. Chau noted pain behavior, but electrodiagnostic studies
28 were negative for radiculopathy and within normal limits. He also

1 noted Plaintiff was responsive to medication. Tr. 344-45. By
2 November 2007, Dr. Chau observed Plaintiff was doing well. However,
3 in February 2008, she was discharged from the clinic due to concerns
4 about medication misuse and failure to attend scheduled
5 appointments. Tr. 342.

6 Dr. Nye's May 2008 treatment notes indicate Plaintiff was
7 showing good response to her medication. He assessed no agility or
8 mobility limits on examination and recommended an orthopedic
9 evaluation and psychiatric medications. Tr. 413-14. He opined
10 symptoms from depression and anxiety and her left knee derangement
11 would significantly interfere with her ability to perform one or
12 more basic work activities. Tr. 414. Although Dr. Nye opined that
13 Plaintiff could not work at the time of his exam, he indicated she
14 could pursue work activities immediately after she received the
15 recommended treatment. Tr. 363.

16 The ALJ briefly discussed medical evidence from Dr. Nye and Dr.
17 Chau and made findings supported by substantial evidence. For
18 example, she referenced Dr. Chau's and Dr. Nye's more recent
19 reports, including MRI results that verified degenerative changes,
20 but no involvement of nerve roots. Tr. 16-17. Consistent with Dr.
21 Nye's 2004 opinion that Plaintiff could not return to her job, the
22 ALJ found Plaintiff could no longer perform her past relevant work.
23 Tr. 20. Noting that some treatment notes related to a period prior
24 to the claimed period of disability, she pointed out that Dr. Chau's
25 March 2007, physical evaluation showed Plaintiff exhibited normal
26 muscle strength, and normal gait. Tr. 16, 329-31. She also noted
27 that in October 2007, Medicaid for physical impairments was denied
28 due to insufficient evidence of a severe physical problem. Tr. 17.

1 The ALJ thus properly considered medical evidence from Plaintiff's
2 treatment providers that is relevant to Plaintiff's claim. Tr. 17.
3 See 20 C.F.R. § 416.912 (d)(once medical evidence is provided by the
4 claimant, the agency develops a claimant's medical history for at
5 least the 12 months preceding the date of application).

6 The ALJ then discussed Dr. Nye's 2008 report and diagnoses
7 along with treatment notes from the Moses Lake Community Health
8 Center (MLCHC). However, she did not reject "marked" physical
9 limitations assessed by Dr. Nye during this time. See Tr. 18, 378-
10 80. Because Plaintiff's alleged onset date was amended to January
11 7, 2008, Dr. Nye's 2008 report and findings are entirely relevant
12 and, as indicated in the Regulations, should have been considered by
13 the ALJ. 20 C.F.R § 416.927(b) and (c).

14 Specifically, the ALJ briefly summarized the 2008 findings, but
15 did not reject Dr. Nye's opinions that Plaintiff would have
16 significant limitations due to depression and knee derangement. Tr.
17 379. Even though there are circumstances in which a reviewing court
18 can infer findings and conclusions from an ALJ's summary of the
19 evidence, *Magallanes*, 881 F.2d at 755, where there are significant
20 limitations assessed by an acceptable medical source who has treated
21 a claimant as long as Dr. Nye has treated Plaintiff, without
22 specific and legitimate reasons for disregarding his opinions, the
23 court is unable to determine if the ALJ's final RFC determination is
24 supported by substantial evidence. Tr. 18. Further, even if there
25 is evidence to support the ALJ's ultimate finding of disability, her
26 decision must be free of legal error. See *Tackett*, 180 F.3d at 1097
27 (reviewing court may reverse ALJ's denial of disability where
28 findings are based on legal error); *Browner*, 839 F.2d at 433.

Here, the ALJ's failure to fully discuss and explain the weight given Dr. Nye's opinions cannot be disregarded by the court. See 20 C.F.R. § 416.927 (b),(c)(2). Further, the court may neither substitute its judgment for that of the Commissioner, nor make independent findings to justify the unexplained rejection of a Dr. Nye's opinions; it is "constrained to review the reasons the ALJ asserts." *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). Failure to set forth specific, legitimate reasons supported by substantial evidence for disregarding a treating physician's report and findings is reversible error. *Orn*, 495 F.3d at 630-33.

B. Other Medical Source Opinions: 20 C.F.R. § 416.913(d)

Plaintiff next argues the ALJ's rejection of other medical source opinions was not legally sufficient. ECF No. 17 at 14. Specifically, she contends the ALJ failed to give "specific" and "germane" reasons for disregarding opinions from her physician's assistant, Joy Becker, PA-C, and mental health counselors Roberta Hansen, MSW, Debra Kietzman, RNC, and Dawn Wilcox, MSW. See, e.g., Tr. 237-39, 302-03, 324-25, 441-45, 466.

The Regulations define "other medical sources" as medical providers who are not "acceptable medical sources," but whose opinions are considered to determine how an impairment affects a claimant's ability to work. 20 C.F.R. § 416.913(d).³ Although only acceptable medical sources can provide evidence to establish a

³ Acceptable medical sources for purposes of these proceedings include licensed physicians, licensed or certified psychologists, optometrists, podiatrists, and qualified speech-language pathologists. 20 C.F.R. § 416.913(a).

1 medically determinable impairment, an ALJ is required to consider
2 observations by other medical sources, such as nurse practitioners,
3 mental health professionals and physician assistants as to how an
4 impairment affects a claimant's ability to work. *Sprague*, 812 F.2d
5 at 1232. An ALJ is obligated to give reasons germane to "other
6 source" testimony before discounting it. *Dodrill v. Shalala*, 12
7 F.3d 915, 919 (9th Cir. 1993). In addition, the Commissioner has
8 directed that weight given to other medical source opinions must be
9 evaluated on the basis of certain factors, e.g., their professional
10 qualifications, how consistent their opinions are with the other
11 evidence, the amount of evidence provided in support of their
12 opinions, whether the other source opinion is well explained, and
13 whether the other source "has a specialty or area of expertise
14 related to the individual's impairment." SSR 06-03p. An
15 adjudicator may consider these factors in giving an other medical
16 source opinion more weight than that of an acceptable medical
17 source. *Id.*

18 The Commissioner also advises that an adjudicator should
19 explain the weight given to other medical source opinions or
20 "otherwise ensure that the discussion of the evidence . . . allows
21 . . . the subsequent reviewer to follow the adjudicator's reasoning,
22 when such opinions may have an effect on the outcome of the case."
23 *Id.* Here, the ALJ's one paragraph summary of Ms. Kietzman's May
24 2007 evaluation does not explain adequately the weight given her
25 opinions or why severe and marked limitations in cognitive and
26 social functions were discounted or rejected. Tr. 17, 238.
27 Evidence from Ms. Hansen and Ms. Becker, both of whom had ongoing
28 contact with Plaintiff, is also probative and must be considered and

1 rejected only by specific and germane reasons that will allow the
2 court to determine if the ALJ's RFC determination is legally
3 sufficient. Although the opinions of a non-acceptable medical
4 source are not afforded controlling weight, the ALJ's failure to
5 properly evaluate their opinions combined with her failure to
6 properly reject Dr. Nye's opinion is prejudicial to the Plaintiff
7 and, therefore, not harmless error. *Stout v. Commissioner, Social*
8 *Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006). On remand, the ALJ
9 will consider all other medical source reports and progress notes as
10 directed by SSR 06-03p, and give specific reasons for rejecting or
11 discounting their findings. Further, the ALJ is required to
12 consider in combination all impairments and limitations (mental and
13 physical) supported by substantial evidence. 20 C.F.R.
14 § 416.945(a)(2). The assistance of a medical expert may assist the
15 ALJ in determining the nature and severity of Plaintiff's and their
16 impact on Plaintiff's ability to perform work. See 20 C.F.R. §
17 416.927(e)(2)(iii).

18 **C. Duty to Develop Record**

19 Plaintiff argues the ALJ had a duty to develop the record by
20 ordering a psychological evaluation based on an agency
21 psychologist's finding in the May 2008 Psychiatric Review Technique
22 Form (Tr. 382) that there was "insufficient evidence" to determine
23 the level of severity for purposes of steps two and three. ECF No.
24 17 at 17.

25 Generally, an ALJ's duty to supplement the record is triggered
26 by ambiguous evidence or when the record is inadequate to properly
27 evaluate the evidence. *Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th
28 Cir. 2001). It is within the ALJ's discretion to develop the record

1 if additional evidence is necessary to resolve a conflict or clear
2 up any ambiguity in the record. The claimant must show prejudice or
3 unfairness in the proceedings to be entitled to a remand. *Hall v.*
4 *Secretary of Health, Ed. and Welfare*, 602 F.2d 1372 (9th Cir. 1979).

5 The record shows that in May 2008, reviewing psychologist Jerry
6 Gardner, Ph.D., completed a Psychiatric Review Technique Form (PRTF)
7 and concluded Plaintiff had the medically determinable impairment of
8 major depression, moderate recurrent, based on Dr. Dalley's 2006
9 evaluation. Tr. 382-95. His reference to "insufficient evidence"
10 relates to Plaintiff's failure to attend a consultative
11 psychological evaluation in April 2008 that was ordered by the
12 agency and would be a basis for determining step two and step three
13 findings of the degree of functional severity. Tr. 392, 394; see 20
14 C.F.R. § 416.920(a). Because Dr. Gardner found insufficient
15 evidence to rate Functional Limitations (criteria "B"), the severity
16 of diagnosed depression for purposes of steps two and three was not
17 assessed at that time. Tr. 392. The ALJ, however, reasonably
18 adopted the Dr. Dalley's and Dr. Gardner's diagnosis of depression
19 at step two and found depression was "severe," based on the record
20 in its entirety. Further, the ALJ appropriately applied the
21 required evaluation technique in his decision. Tr. 14. See 20
22 C.F.R. § 416.920a(e)(4)(at ALJ hearing, the written decision must
23 incorporate PTR findings after consideration of the entire record).

24 Plaintiff's argument that her failure to attend the
25 consultative evaluation or respond to the agency's efforts to
26 contact her triggers the ALJ's duty to develop the record by
27 ordering a second psychological evaluation is unpersuasive. Not
28 only does a post-hearing psychological evaluation have limited, if

1 any, probative value at this time, the existing record contains
2 evidence from medical providers dated after May 2008 through the
3 date of the decision that, as discussed above, include functional
4 limitations that will be discussed and re-evaluated by the ALJ on
5 remand. By the time of the March 2010 hearing, the ALJ had a
6 complete record and did not identify an ambiguity or inadequacy that
7 would trigger development of the record. She made sufficient
8 findings at steps two and three, based on Dr. Gardner's PRTF and the
9 entire record, to satisfy the requirements of 20 C.F.R. §
10 416.920a(e)2). Nonetheless, if Plaintiff has records that relate to
11 her alleged period of disability and the 12 months prior to her
12 application for benefits, she may supplement the record on remand.

13 **D. Remedy**

14 Where evidence exists that may be a basis for rejecting a
15 medical opinions and other source opinions, the court may remand to
16 allow the ALJ to provide the requisite specific and legitimate
17 reasons for disregarding the opinion. *See McAllister v. Sullivan*,
18 888 F.2d 599 (9th Cir. 1989); *Salvador v. Sullivan*, 917 F.2d 13, 15
19 (9th Cir. 1990). Here, the ALJ failed to articulate her reasons for
20 disregarding medical opinions; however, it appears there may be
21 evidence to support specific and legitimate reasons for discounting
22 the medical opinions at issue. Further, there are outstanding
23 issues to be resolved regarding whether Plaintiff's functional
24 limitations supported by the record preclude other work in the
25 national economy. *See Smolen*, 80 F.3d 1273, 1292 (9th Cir.
26 1996)(remand for additional proceedings appropriate where
27 outstanding issues unresolved). On remand, the ALJ may call a
28 medical expert to assist in (1) interpreting the objective medical

1 evidence presented, and (2) assessing Plaintiff's impairments in
2 combination. *Andrews*, 53 F.3d at 1041. Based on the ALJ's re-
3 evaluation of the medical opinions and supplemental records
4 submitted by Plaintiff, if any, a new RFC determination will be
5 required and, if necessary, new step five findings. Accordingly,

6 **IT IS ORDERED:**

7 1. Plaintiff's Motion for Summary Judgment (**ECF No. 16**) is
8 **GRANTED** and the matter is remanded to the Commissioner for
9 additional proceedings consistent with this decision and pursuant to
10 sentence four of 42 U.S.C. § 405(g).

11 2. Defendant's Motion for Summary Judgment (**ECF No. 27**) is
12 **DENIED**.

13 3. An application for attorney fees may be filed by separate
14 motion.

15 The District Court Executive is directed to file this Order and
16 provide a copy to counsel for Plaintiff and Defendant. Judgment
17 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

18 DATED April 16, 2013.

19
20 S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE